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Supreme Court of the United States

MARCH TERM, 1956

STATE OF SOUTH CAROLINA EX RELATIONE S. C. PUBLIC SERVICE COMMISSION, APPELLANT,

versus

UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, ATLANTIC COAST LINE RAILROAD COMPANY, ET AL., APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

STATEMENT AS TO JURISDICTION

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INTRODUCTORY STATEMENT

In pursuance of Rules 13 and 15 of the Revised Rules of the United States Supreme Court, the following statement as to jurisdiction is submitted on behalf of the State of South Carolina ex relatione S. C. Public Service Commission, appellant:

JURISDICTIONAL STATEMENT

A.

Reference to Opinion of Court Below

The opinion of the Court below has not yet been officially reported. A copy of such opinion is hereto attached.

The judgment of the Court below upheld an order of the Interstate Commerce Commission setting aside state-made freight rates and fixing rates for intrastate traffic in the State of South Carolina; the majority of the Court holding that the opinion of the railroad witnesses, based on results in interstate traffic, was substantial evidence of the results to be expected from such rates in intrastate traffic in South Carolina.

One of the members of the Court filed a dissenting opinion holding that there was no substantial evidence that the increased rates would produce a substantial increase in the revenues.

B.

Statement of Grounds on which Jurisdiction Invoked

I. This was a suit by the State of South Carolina and the South Carolina Public Service Commission to set aside and enjoin an order of the Interstate Commerce Commission, dated September 19, 1955, confirming a Report dated June 20, 1955 (296 I. C. C. 159-181).

The principal contention set forth in the complaint was that there was no substantial evidence in the record before the Interstate Commerce Commission to support the order of the Commission and that the evidence conclusively showed that the increase in rates would cause such a diversion of traffic that there would be no substantial increase in the revenues of the railroads.

The suit was brought in the United States District Court for the Eastern District of South Carolina pursuant

to §1336 of the Judicial Code Annotated, which expressly provides that the District Court shall have jurisdiction of any civil action to enjoin or set aside any order of the Interstate Commerce Commission; and pursuant to §2325 and §2284 of the said Code which provides that such actions to enjoin orders of the Interstate Commerce Commission must be heard by a three-judge court.

II. The decree sought to be reviewed herein was dated on the 31st day of December, 1955 and filed in the United States District Court for the Eastern District of South Carolina on January 3, 1956. There was no petition for a re-hearing.

The notice of appeal was filed in said District Court on January 31, 1956.

III. Jurisdiction of this appeal is expressly conferred on the United States Supreme Court by §1253 U. S. Code Annotated, Title 28, which provides that any party may appeal to the Supreme Court from an order granting or denying an interlocutory or permanent injunction in any suit required to be heard and determined by a three-judge court, and by §2101 which provides that any such direct appeal to the Supreme Court shall be taken within thirty days from the decree if interlocutory and within sixty days if final. The judgment appealed from in this case was a final judgment.

IV. It is believed that the jurisdiction is sustained by the following, among other, cases:

Mississippi Public Service Commission v. The United States of America, 124 Fed. Sup. 809, affirmed by U. S. Supreme Court, April 18, 1955 (99 L. Ed. 502);

North Carolina v. United States, 325 U. S. 507, 89 L. Ed. 1760;

Illinois C. R. Co. v. State Pub. Utilities Commission, 245 U. S. 493, 510, 62 L. Ed. 425, 438, 38 S. Ct. 170, P. U. R. 1918C 1279, holding syllabus):

"8. An order of the Interstate Commerce Commission requiring a readjustment of intrastate rates prescribed by state authority, made for the purpose of removing a discrimination against interstate commerce found to result from a disparity between intrastate and interstate rates, is invalid for uncertainty where it has no definite field of operation and leaves uncertain the territory or points to which it applies.

Florida v. United States, 282 U. S. 194, 75 L. Ed. 291 (310);

Universal Camera Corporation v. N. L. R. B., 340 U. S. 474, 95 L. Ed. 456.

In the above cited *Mississippi case*, which was in principle on all fours with the case at bar, and concerned freight rates on many of the same commodities here involved, the Court reversed an order of the Interstate Commerce Commission undertaking to apply interstate freight rates to intrastate traffic. In its opinion, which was affirmed by the United States Supreme Court on April 18, 1955 (99 Fed. 502), the court held particularly that to support an order of the Interstate Commerce Commission interfering with state-made rates, it must be shown by substantial evidence that a substantial increase in revenues would result; that a calculation based on the assumption that the volume of traffic would continue the same under the increased rates was not substantial evidence; that different conditions in different states justified and required different results; that the question of whether the evidence was substantial was a question of law for the Court; that the evidence offered was not substantial and hence that the order of the Commission should be reversed.

In its opinion, the Court made the following findings in the following language which is peculiarly applicable to the case at bar:

"The true rule is that, whenever the Commission attempts to exert the power to interfere with intrastate rates which are otherwise in the dominion of state regulation, the justification for the exercise of such power by the Commission must clearly appear of record. Otherwise, the Commission's action is a clear and unlawful encroachment upon the reserved power and authority of the state.

"In order to authorize the Commission to exercise the power to nullify intrastate rates under Section 13(4) of the Act, it must be shown, among other things, (a) that the intrastate rates involved are abnormally low and are not contributing their fair share of the revenue of the carriers involved; (b) that the disparity between the rates is substantial and operates as a real discrimination against and obstruction to interstate commerce; (c) that injury to interstate shippers has resulted and will continue to result because of the disparity in rates; (d) that the proposed rates are just and reasonable; and (e) that a substantial increase in the carriers' revenue will result from the proposed increase in the intrastate rates. *State of North Carolina v. United States, supra.*" (124 Fed. Sup. 813.)

"The testimony of the various witnesses who are shippers of many of the products involved herein demonstrates that if the rates are permitted to stand as fixed by the Interstate Commerce Commission, the income of the railroads will be reduced rather than increased. Many of these are shippers themselves and testified positively and unequivocally that it would be economy for them to use their own individual trucks or private carriers by truck, who are unregulated so far as rates are concerned in Mississippi * * *"

* * *

"The testimony of the various witnesses and experrts who testified for the carriers along with their many exhibits, opinions and tests has not been overlooked but their testimony has been fully weighed in the light of the entire record and proceedings in this cause and when viewed in this light the testimony fails to show substantiality sufficient to uphold the order

here under attack and the findings that were made by the Interstate Commerce Commission * * *." (p. 816.)

Likewise in the above cited *North Carolina case* the Supreme Court of the United States reversed an order of the three-judge court and of the Interstate Commerce Commission undertaking to require interstate passenger rates to be put into effect in **intrastate** transportation in North Carolina.

In that case it was expressly held: that the fact that the same facilities were used in both interstate and intrastate commerce was not sufficient justification for the Interstate Commerce Commission to require that the prescribed interstate rates be also applied intrastate in North Carolina, saying:

> "So here the finding that interstate passengers paid higher fares than intra-state passengers for the same facilities is an inadequate support for nullifying state rates on the ground that they constitute unjust discrimination against interstate passengers." (89 L. Ed. 1767.)

"Intra-state transportation is primarily the concern of the state", said the Court. "The power of the Interstate Commerce Commission with reference to such intra-state rates is dominant only so far as necessary to alter rates which injuriously affect interstate transportation. *American Exp. Co. v. South Dakota,* 244 U. S. 617, 625, 61 L. ed. 1352, 37 S. Ct. 656, P. U. R. 1917F 45. A scrupulous regard for maintaining the power of the state in this field has caused this Court to require that Interstate Commerce Commission orders giving precedence to federal rates **must meet 'a high standard of certainty'**. *Illinois C. R. Co. v. State Pub. Utilities Commission,* 245 U. S. 493, 510, 62 L. ed. 425, 438, 38 S. Ct. 170, P. U. R. 1918C 1279. Before the Commission can nullify a state rate, justification for the **'exercise of the federal power must clearly appeal'**. *Florida*

v. United States, 282 U. S. 194, 211, 212, 75 L. ed. 291, 301, 302, 51 S. Ct. 119. See also *Yonkers v. United States,* 320 U. S. 685, 88 L. ed. 400, 64 S. Ct. 327 • • •"

In the above cited *Florida case,* an order of the Interstate Commerce Commission undertaking to establish carload rates for use in intrastate commerce within the state of Florida was reversed, especially, as the Court said, where there were no findings as to the revenue which could reasonably be expected under the increased rates.

In its opinion, by Chief Justice Hughes, the Court noted that,

> "The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage. *Railroad Commission v. Chicago, B. & O. R. Co.,* 257 U. S. 563, 66 L. Ed. 371, 22 A. L. R. 1086, 42 S. Ct. 232, *supra* • • •." (75 L. Ed. 303.)

In the above cited *Universal Camera Corporation case* (95 L. ed. 456) it was specifically held that under the Administrative Procedure Act requiring a reviewing court to "set aside administrative action unsupported by substantial evidence", a reviewing court, in determining the substantiality of evidence supporting a decision "of an administrative commission or board" • • • must take into account whatever in the record fairly detracts from the weight of the evidence, and cannot uphold a decision of the Board or Commission merely on the basis of evidence which in and of itself justifies it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." (p. 457.)

C.

Statement of Questions Presented by Appeal

The questions presented by this appeal are:

1. That in this case involving an attempt by the Interstate Commerce Commission to interfere with State-made rates for intrastate commerce, the burden was upon the carriers and the defendants to establish their case by substantial evidence of a high standard of certainty and that they failed to sustain this burden and hence the order of the Commerce Commission should have been reversed.(?)

2. That the majority of the District Court erred in failing to find that the evidence conclusively showed that the proposed increase in freight rates, if applied to intrastate, would cause such a diversion of traffic as not to produce any substantial increase in revenue, and hence that the order of the Interstate Commerce Commission should be reversed.(?)

3. That the majority of the District Court erred in finding that the evidence offered by the railroad companies of an increase in revenues from interstate system operations under the increased freight rates constituted substantial evidence that there would be a substantial increase in revenues from intrastate traffic under the proposed increase in rates.(?)

This question also comprises the further question or proposition that the lower Court's conclusion that in this case the weight to be given to experience with interstate rates "is a matter of expert judgment as to which the opinion of railroad traffic experts is certainly substantial evidence of real value" is erroneous and amounts to an abdication by the court of its function in the regulation of freight rates.

4. That the majority of the District Court erred in failing to find that this case was on all fours with the Missis-

sippi case (*Mississippi Public Service Commission v. The United States of America,* 124 Fed. Sup. 809, affirmed by U. S. Supreme Court, April 18, 1955, 99 L. ed. 502) and hence that the order of the Interstate Commerce Commission should be reversed and enjoined.(?)

5. That the majority of the District Court erred in failing to hold and find that there was no substantial evidence to show that the proposed increase in rates, if applied to intrastate traffic, would produce any substantial increase in revenue from intrastate traffic.(?)

6. That the majority of the District Court erred in failing to hold and find that the uncontradicted evidence of the shippers as to the increase in freight rates causing a diversion of traffic and a resulting loss of revenue, coupled with the findings of the South Carolina Public Service Commission to the same effect, was conclusive and hence that there was no substantial evidence to support the finding of the Interstate Commerce Commission and that such order should be reversed.(?)

7. That the only evidence offered by the carriers as to the amount of the alleged loss from the failure of the South Carolina Commission to authorize the increased rates, was based upon the assumption that the amount of traffic involved would continue the same under the increased rates, whereas all the evidence showed, and the Commission itself so found, that under the increased rates there would be a substantial diversion of traffic, and hence there was no sufficient evidence of the amount or substantiality of any possible increase in the carriers' revenues from the increased rate, and hence the order of the Commission should have been reversed.(?)

The foregoing question embraces the further question or proposition that the finding of the Interstate Commerce Commission and of the Court below as to the amount or substantiality of the possible increase was not sufficiently

definite or specific to meet the test required by the decisions of the United States Supreme Court.

8. That the action of the carriers with the consent of the Interstate Commerce Commission in withdrawing the major item of cement and the item of cotton from the commodities involved, constituted convincing proof, and a recognition by the defendants themselves, of the unsubstantiality of the alleged evidence of any increase in the revenues of the carriers from the increased rates, and hence the order of the Commission should have been reversed.(?)

9. That the District Court erred in finding the facts to be as set forth in the report of the Interstate Commerce Commission and hence that the plaintiffs were not entitled to the relief prayed for.(?)

10. That the District Court erred in refusing the injunction against the order of the Interstate Commerce Commission as prayed for in the complaint and in dismissing the complaint.(?)

The question presented by many of the foregoing questions, particularly Nos. 1, 2, 3, 4, 5 and 6, when applied to the particular facts of this case, may be considered as embraced within the following specific question:

Was the evidence offered by the railroad companies of an increase in revenues in interstate commerce from the increased freight rates, when considered in the light of the testimony of the shippers involved and of the finding of the South Carolina Public Service Commission, sufficient to constitute substantial evidence that such rates would produce an increase in revenue if applied to intrastate commerce?

D.

Statement as to the Facts

This case has arisen out of the filing by the railroad companies with the Interstate Commerce Commission of a petition in which it was claimed that, by reason of the failure of the S. C. Commission to allow for **intrastate** traffic in South Carolina certain increases in rates authorized by the Interstate Commerce Commission for interstate traffic, the railroad companies were losing annually the following amounts on the following commodities:

Cement	$214,743.23
Clay	2,608.71
Cotton	10,803.78
Cottonseed	2,340.13
Cottonseed Oil, Meal and hulls	3,323.45
Limestone, agricultural	26,176.80
Logs	109,137.86
Pulpwood	187,173.09
Road Building Material	2,684.63
Sand	96,962.45
Gravel	64,110.93
Stone, crushed	119,701.40
Sugar	4,779.06
	$844,545.52

(1) In the proceeding before the Interstate Commerce Commission, there was no real evidence showing that the railroad companies would lose any such amount or indeed any specific amount as a result of such failure on the part of the Commission to authorize the increase in rates for intrastate commerce. The calculation itself was based upon a four-week study projected to a yearly basis, and the calculation assumed that if the rates were increased as sought, the volume of traffic would remain the same.

On this point the railroad's principal witness Kane testified on cross examination as follows:

> "Q. Now I understand in making these calculations of figures and losses, they were based upon the theory that with the increase in rates you would have the same volume of tonnage?
>
> A. We assume that that would be a representative period as to movements, taking into consideration some would be less and some greater.
>
> Q. But you didn't take into consideration the fact or the assumption that with the increase in rates there would be less volume of tonnage?
>
> A. No, sir." (Tr. 497-498.)

Evidence of precisely this type was held in the *Mississippi case* not to be sufficient to constitute substantial evidence.

(2) The item of **sugar** ($4,779.06) was withdrawn by the carriers at the commencement of the hearing.

As to the item of **cement**, ($214,743.23) the facts are that during the hearing an abundance of testimony was offered showing that to increase the rates, would cause a diversion of traffic and a resulting loss of revenues to the companies. After the filing of the report by the examiner, the railroad companies, by petition, asked to be allowed to withdraw the item of cement upon the grounds as stated "that they must reduce their rates if they were to continue to participate in the traffic in competition with the trucks", and further that the prevailing rates "are the maximum rates which they can maintain if they are to continue to participate in the traffic and regain any of that which had already been lost to the trucks".

Likewise, as to the item of cotton ($10,803.78) the railroad companies, after the report of the Commission, asked to be allowed to withdraw this item also upon the ground as stated, "real carriers are faced with a loss to

motor trucks of the majority of the cotton produced along their lines".

The evidence offered by the carriers as to any possible increase in revenues from an increase in rates on the remaining items was no stronger than, and indeed was the same as, the evidence offered by them with relation to cement and cotton.

(3) The shippers concerned, all testified with one accord that to increase the rates as proposed in intrastate commerce would cause such a diversion of traffic to the trucks as to result in a loss of revenue to the carriers.

Witnesses J. R. Pennell, R. S. Campbell, Jr., and Sam C. Dreyfus testified especially with reference to the items of **limestone** (agricultural) ($26,176.80), **road-building material** ($2,684.63), **sand** ($96,962.45), **gravel** ($64,110.93) and **crushed stone** ($119,701.40).

The witness Pennell testified substantially that the freight bill of his company amounted to a little over one-half million dollars a year; but that he was in the process of remodeling some of his company's facilities so as to haul by truck and trailer, and that if the rates were increased as sought in intrastate commerce, his company's business would go largely to trucks (Tr., pp. 443-452).

The witness R. S. Campbell, Jr., testified substantially that the Beverly Quarry with which he was connected originated approximately $232,000.00 of revenue freight in 1953, and that if the rates were increased as sought, the bulk of this business would go to trucks, and that the company's revenue would be reduced by at least $102,256.00. (Tr., pp. 813-814.)

The witness Sam C. Dreyfus testified substantially to the same effect. (Tr., pp. 839-844.)

As to the item of **pulpwood** ($187,173.09) witnesses J. E. McCaffrey and L. P. Hearn for the International

Paper Company; and C. H. Neiderhof and J. C. Albert for the West Virginia Pulp & Paper Company, testified and submitted documentary evidence to the effect that the increase in rates would divert more cordage from the railroad companies and result in less and not more revenues; and the photographic exhibits offered by the witnesses showed that the paper companies were prepared by facilities to divert the traffic from the railroads to trucks or barge. (Tr., pp. 585-611; 615-628; 628-661; 661-664.) Exhibits Nos. 31 to 43 inclusive.)

The witness McCaffrey testified specifically that his company, by using barge and trucks, could save from $125,000.00 to $200,000.00 annually under what the railroad companies were asking and that his company would do so rather than ship by railroads under the increased rates. (Tr., 587-589, 602-605.)

Mr. Neiderhof, for the West Virginia Pulp & Paper Company, testified that if the rates were increased as sought, his company would divert 74,040 cords of pulpwood from the railroad companies to the trucks with a resulting direct loss to the railroad companies of $176,878.00. (Tr., p. 619.)

The witness J. C. Albert, for the West Virginia Pulp & Paper Company, testified that in addition to the pulpwood revenue loss, the Coast Line would lose about 40,000 tons of outbound paper products (from Charleston Mill) (Tr., p. 663) that is, about 2,000 carloads, (having an estimated revenue of $340,000.00, according to estimates by the S. C. Public Service Commission).

In the face of the foregoing testimony, the Interstate Commerce Commission, by its order of September 19, 1955, reopened the proceeding as to the pulpwood rates to Georgetown but sustained the increases sought with reference to the pulpwood rates to Charleston and elsewhere.

The witness R. M. Hughes testified substantially with reference to the items of cotton, cottonseed, oil, meal and hulls that an increase in rates in intrastate commerce would cause a diversion of more tonnage to trucks and a resulting loss of revenue to the railroad companies.

The witness V. L. Turner's testimony, with reference to the item of logs, shows, as is common knowledge, that the transportation conditions for pulpwood and logs are substantially the same, ("a saw log is simply a stick that has been left standing for a longer period of time than most pulpwood sticks that are shipped", Exhibit 21, p. 9) and hence that the same transportation conditions relative to pulpwood are equally applicable to logs.

Mr. Kane's exhibit hereafter set forth shows that under the increased rates the total tonnage of the four principal carriers in logs dropped from 1,563,621 in 1947 to 1,181,017 in 1952.

There was no specific testimony with reference to the item of clay ($2,608.71) but this is a very small item and it is our position that the testimony relative to the items of road-building materials, sand, gravel and crushed stone are equally applicable to clay.

The witness C. E. Logwood, Director of the Rate Bureau of the S. C. Public Service Commission, testified and submitted evidence on behalf of the Commission. (Tr., pp. 753-783.) His evidence showed that the S. C. Public Service Commission had held numerous hearings on the matter of the application of the increased rates to intrastate commerce and taken an abundance of testimony (at least 1,476 pages); that at such hearings the shippers had testified that if the rates were increased in intrastate commerce as sought, they would divert their traffic to trucks with a resulting traffic loss to the railroad companies; that the S. C. Public Service Commission was familiar with

the network of highways in the State of South Carolina, (Exhibits No. 47 and No. 48 being introduced to show the railroad and highway systems in the state); and that the South Carolina Commission had refused to allow the proposed increased rates on the items here involved for the reason that it had concluded that the proposed increases, if allowed, would cause a diversion of traffic to the trucks and a resulting loss in revenue instead of an increase in revenue to the companies.

As to **cement**, Frank J. Cain, Jr., Vice President in charge of sales of Giant Portland Cement Company and subsidiary, testified (Tr., pp. 664-667) that his companies shipped approximately 6,500 tons of cement (4,000 tons intrastate); that their freight bill amounted to $1,450,000.00 annually; that since 1948 an increasing number of customers have been demanding truck service; that rates by rail and truck are presently on a substantial parity but that if Section 13 is invoked and freight rates are increased as petitioned by the railroads, "the result inevitably will be a diversion of the traffic from the rails to motor carriers, and a substantial loss of revenue to the railroads".

Cement, however, (as above shown) is no longer an issue in this case as the carriers have withdrawn their request for an increase on that item in order, as they stated, to enable them to meet truck competition.

The evidence of the shippers thus indicates that instead of a revenue gain, from the increased rates, of $844,545.52 as claimed by the railroad companies, there would be a resulting loss to the companies (exclusive of cement) of at least $867,000.00 as follows:

On crushed stone, sand, gravel, etc., as testified to by the witness Pennell	$250,000.00
On pulpwood, as testified to by the witness Neiderhof (Tr., p. 619)	176,878.00

On crushed stone, etc., as testified to by the witness R. S. Campbell, Jr. (Tr., pp. 813-814)	102,256.00
On outbound paper products, 2,000 carloads, as testified to by the witness J. C. Albert (Tr., p. 663) (estimated by the S. C. Commission to amount to)	340,400.00
Total	$869,534.00

(4) On behalf of the railroad companies, it was contended principally that the experience obtained by the railroad companies from the application of the increased rates in interstate commerce had convinced them that the application of the increased rates to South Carolina intrastate commerce would likewise produce a substantial increase in revenue.

The railroad companies offered witnesses and submitted exhibits that under the increased rates in interstate commerce, the gross revenue of the companies had increased and based on such fact their witnesses gave it as their opinion that the increased rates would produce some increases in revenue if applied intrastate.

The essence of their testimony is shown in their exhibits showing system results in interstate commerce, all their opinions being bottomed thereon.

Mr. J. A. Kane, Assistant General Freight Agent for the Seaboard Air Line Railroad Company, testified that the increases in the interstate rates became effective from time to time in 1947, 1948, 1949 and 1952 and that as shown by his Exhibit 3, Section H, the total tonnage and revenues of the four principal railroads involved (A. C. L. Rr., C. & W. C. Ry., S. A. L. Rr., and Sou. Ry.,) on the commodities here concerned for the year 1947 as compared with 1952 were as follows:

Commodity	1947 *Tons*	1947 *Revenue*	1952 *Tons*	1952 *Revenue*
Cement:				
Total	3,392,312	$ 7,990,849	4,484,624	$14,611,572
Index	100	100	132	183
Cotton:				
Total	1,966,638	7,750,733	1,517,916	8,722,283
Index	100	100	77	112
Cottonseed:				
Total	67,284	132,971	52,580	147,443
Index	100	100	78	111
Cottonseed Oil Meal:				
Total	81,777	229,854	155,898	783,594
Index	100	100	191	341
Cottonseed Hulls:				
Total	14,575	40,741	21,389	87,875
Index	100	100	147	216
Clay:				
Total	1,418,069	4,129,251	2,108,741	7,365,811
Index	100	100	149	178
Gravel and Sand:				
Total	6,970,148	5,820,604	10,680,508	9,810,801
Index	100	100	241	169
Stone, Broken, Ground and Crushed:				
Total	9,603,079	7,288,816	16,777,686	12,921,049
Index	100	100	175	177
Logs:				
Total	1,563,621	1,883,233	1,181,017	2,010,430
Index	100	100	76	107

A portion of Mr. Kane's testimony on direct examination is quoted in the opinion of the majority of the Court.

The following portion of his testimony, however, is omitted from such quotation:

"• • •

"From a revenue standpoint, **cement, road aggregates,** and **pulpwood** are the three most important commodities involved in this case. Section H shows that in 1952 the intrastate tonnage of cement was 32 per cent greater than in 1947 and that the revenue received was 83 per cent greater." (Emphasis ours.)

On cross examination Mr. Kane testified as follows:

"Q. Now as a matter of fact don't you know that on practically all of these items that we are concerned

with here, the disallowed items shown on your C-14, that an increase in rates would tend to decrease the volume of shipping?

A. No, sir, I don't know that. There may be some falling off; there may not be.

Q. All right. Is that the best answer, now, you are willing to make?

A. That's the only answer I can give you. I don't know it for a fact, no, sir. You asked me if I knew that there would be, and I do not.

Q. All right. Well, I want to ask you, because you are supposed to study the effect of rates, aren't you?

A. Yes, sir.

Q. All right. But you are not willing to say to the Court in fairness now, whether or not an increase in these rates on any of these commodities would probably result in a decrease in the volume of traffic?

A. No, sir, I can't say it would. "**There may be some loss in tonnage and there may be some increase in revenue.** (Emphasis ours.)

The gist of the testimony on direct examination of Mr. J. G. Middleton, General Freight Agent of the Atlantic Coast Line Railroad Company, is set forth in the opinion of the majority of the Court below.

As there shown, he testified substantially that he thought the increases in rates would produce increased revenues; that the most convincing proof is what has happened to this total traffic as shown by his Exhibit D-1: that no comparable figures were available for South Carolina but in his opinion the total system figures were more pertinent anyway; that some diversions had taken place as a result of the increases but that "we do not feel that the sought measures will be self-defeating * * *"

On cross examination he testified, in part, as follows:

"Q. Do you think pulpwood is the kind of commodity that moves over the Coast Line at rates 30 per cent higher than over competing rail lines located not very far away?

A. Well, it moves that way interstate, Mr. Winn.

Q. And your assumption in arriving at this figure was that you wouldn't lose any pulpwood traffic to these other railroads maintaining lower pulpwood rates than you propose?

A. That's the basis of the figures, yes, sir.

* * *

Q. (By Mr. Winn) Mr. Middleton, are you familiar enough with the pulpwood traffic to know that on short hauls that pulpwood moves by truck?

A. Yes, sir.

Q. In competition with rail movement?

A. Yes. Well, I don't know whether it is competition, **but for real short hauls most of it moves by truck.** There is not much competition with the railroads where it is just a matter of a few miles difference in the distance. (Emphasis ours.)

* * *"

His Exhibit D-1 showed:

Total tons handled by, and total freight revenues of Coast Line for years 1945 through 1952

Year	*Tons*	*% of 1945*	*Freight Revenue*	*% of 1945*
1945	33,333,055	100.0	$ 83,400,965	100
1946	36,107,919	108.3	82,766,704	99.2
1947	36,122,507	108.4	89,444,952	107.2
1948	36,110,890	108.3	99,796,757	119.7
1949	31,790,117	95.4	91,650,985	109.9
1950	37,959,403	113.9	101,374,387	121.6
1951	45,027,135	135.1	122,826,626	147.3
1952	46,242,607	138.7	131,457,721	157.6

The gist of the testimony of Mr. C. W. Dilli, Assistant Freight Traffic Manager of the Southern Railway Company, on direct examination, is copied in the majority of the opinion of the Court below.

He testified as there shown that his Exhibit No. 11 shows that following the rate increases both tonnage and revenues of the system had increased every year, 1946 through 1952, except for 1949; that if the rates were increased as sought, their revenue would be increased and

that "we are capable of exercising our managerial discretion necessary to achieve that objective."

Exhibit 11, mentioned by Mr. Dilli in his testimony, shows:

Total Interstate and Intrastate Tonnage and Revenue of Southern Railway, 1946-1953

	Year	*Tons Carried*	*Freight Revenue*
	1946	62,306,399	$164,126,085.29
	1947	66,045,102	186,185,802.79
	1948	65,945,658	207,256,591.57
(a)	1949	52,917,266	178,569,622.17
	1950	60,582,010	201,940,657.87
	1951	64,973,796	221,124,003.96
	1952	64,500,413	230,743,186.10
(b)	1953		236,557,266.59

On cross examination he testified as follows:

"Q. (By Mr. Sapp) On page 4 of your Exhibit No. 6, Mr. Dilli, you refer to crushed stone and the anticipated loss of revenue of $65,939.09 after its projection to the entire year. Am I correct in that understanding of this exhibit?

A. Yes, sir.

Q. Now that is within the entire state of South Carolina on intrastate movements?

A. On intrastate movements of traffic terminated by the Southern Railway.

Q. Now, in getting that estimate did you give any effect to the loss of traffic which might result as a result of the increased transportation rail rate?

A. No, We had no way of doing that. I didn't anticipate that we would lose any traffic.

Q. You gave no effect whatsoever to loss of traffic?

A. No, sir."

There was no testimony offered by the railroad companies as to the total volume of the traffic in the commodities here involved, that is, the volume of traffic carried by

both the railroads and the trucks, nor any evidence as to the relative proportion of such traffic carried by the railroads under the increased interstate rates.

Now was there any direct testimony from any witness on behalf of the railroads, resident in South Carolina, or from anyone shown to be familiar with South Carolina conditions, to the effect that the testimony of the shippers as to the diversion of the traffic in intrastate commerce was unreliable.

It is recognized by the plaintiff-appellant in this case that the foregoing testimony constitutes some evidence that under the increased rates there has been an increase in the revenues of the carriers from **interstate** operations.

It is the position of the plaintiff-appellant, however, that such evidence of an increase in revenues in interstate traffic from increased rates does not constitute any substantial evidence that under the increased rates there would be any substantial increase in revenues from **intrastate** traffic in South Carolina.

Our position on this point is directly sustained by the North Carolina and the Mississippi cases above cited.

On this point, the Interstate Commerce Commission in its report said:

> "**General discussion and conclusion**—In general, the protestants' testimony is to the effect that the increased rates sought would result in a diversion of tonage to other forms of transportation in such degree that a reduction rather than an increase in revenue would occur. The increases sought for intrastate application are no higher than those effected on interstate traffic. So far as appears, no such result occurred in the transportation of the latter traffic. While the evidence is convincing that some, and perhaps a material, diversion of traffic in some of these commodities will result from the increases herein approved, nevertheless, after weighing carefully protestants' and respond-

ents' testimony, we reach the conclusion that a substantial increase in respondents' revenues can reasonably be expected from intrastate rates as thus increased, and that such rates will not in any instance exceed a just and reasonable basis."

The case was heard in the Court below on the record before the Interstate Commerce Commission, together with an exhibit offered at the hearing relative to the withdrawal of the item of cotton from the proceeding.

The majority of the District Court in its opinion after quoting the testimony hereinabove set out, held: "* * * that the foregoing testimony, together with the exhibits evidencing traffic studies upon which the testimony is based, furnish ample support for the finding of the Commission which is assailed", and thereafter said:

"Whether experience with interstate rates is a dependable guide in judging the effect of a corresponding increase in intrastate rates is a matter of expert judgment as to which the opinion of the railroad traffic experts is certainly substantial evidence of real value, as their railroads will bear the loss if the increase of rates which they propose results in a decrease of revenue. Certainly **their** opinion is entitled to as much weight as prohecies of traffic loss by interested shippers who have everything to gain and nothing to lose by holding intrastate rates at the existing level. At all events, we cannot say that the evidence upon which the Commission acted, which consisted not only of the testimony of these experts but also of the traffic studies upon which it was based, was not substantial evidence . . ."

Judge Timmerman filed a dissenting opinion, saying **passim**:

"The substance of the testimony offered by the proponents of the proposed rate increases is that they guess or surmise that the increased rates will result in increased revenue. They have not established any facts from which it can be concluded that the railroads will

suffer only a certain percentage of diversion by reason of the increased rates.

" • • •

"We do have one fact in common in this case. It is this: Both groups agree that the increased rates will cause diversion of traffic from the railroads to other type carriers having lower rates. The only difference between them is their generalizations as to how much diversion will be accomplished by the increased rates. Of course the railroads hope that the increased rates will bring them increased revenue. This hope undoubtedly prompted the opinion that they will. I see nothing else in the record to justify the opinion. The shippers frankly are in favor of cheaper freight rates, which is natural, and they indicate that they intend patronizing the carriers that afford them the cheaper rates. If so, what then becomes of the hope of the railroads for increased revenue? To repeat, I have found in the record no established fact or facts justifying the conclusion that the revenue of the railroads will be increased, or that the diversion of freight from the railroads to other type carriers will be inconsequential by reason of the increased freight rates. I, therefore, dissent."

E.

Statement of Reasons Requiring Plenary Consideration of Case

It is submitted that the judgment of the Court below should be reversed, and the questions presented are such as to require plenary consideration, for the following reasons:

I. There is a direct conflict between the judgment of the Court below and the decision of the three-judge District Court in the *Mississippi case* which was affirmed by the United States Supreme Court.

In the case at bar, the majority of the Court held that "whether experience with interstate rates is a dependable guide in judging the effect of a corresponding increase in

intrastate rates is a matter of expert judgment as to which the opinion of the railroad traffic experts is certainly substantial evidence of real value".

In the *Mississippi case,* the Court held "different conditions, circumstances and situations in different states require and justify different results in fixing intrastate rates. The findings of a state commission which is familiar with such conditions in the state * * * detracts heavily against the findings of the Interstate Commerce Commission, whose testimony is taken before an examiner. * * *"

The opinion of the majority of the Court below makes no effort to distinguish or to discuss the holdings in the *Mississippi case* but merely says that it was "distinguished" by the Commission "on the ground that in the present case there was substantial evidence to support the finding". The majority opinion does not even undertake to show why the evidence as to the effects of increased rates in interstate commerce can be considered "substantial" evidence in the face of the holding of the *Mississippi case* to the contrary.

The facts in the *Mississippi case* were much the same as in the case at bar, involving an effort by the Interstate Commerce Commission to put into effect in Mississippi the same freight rates on many of the commodities here involved and the testimony of the railroads being essentially the same as that here presented; and it being held that the evidence was not substantial to show that there would be any substantial increase in the carriers' revenue from the application of the rates in intrastate commerce.

II. The holding of the Court below to the effect that the question whether experience in interstate commerce is a dependable guide as to the results to be expected in interstate commerce "is a matter of expert judgment as to which the opinion of the railroad traffic experts is certainly substantial evidence of real value" is erroneous and is in

direct conflict with the opinion in the *Mississippi case* affirmed by the United States Supreme Court to the effect that "substantial evidence is a legal term and presents to the court of adjudication a question of law", and that "different conditions in different states require and justify different results in fixing intrastate rates".

If questions of this sort are to be determined ultimately by "the opinion of the railroad traffic experts" as stated in the majority opinion, then there is nothing left either for the regulatory commissions or for the courts to do in a case of this kind. As was stated by Judge Timmerman in his dissenting opinion, "if there was nothing more in this case than merely finding out what the railroads wanted, it would have been unnecessary to have a hearing. That could have been determined by writing a letter".

The opinion of the Court below really holds that questions of the sort here involved are to be determined in the last analysis by the "opinion of the railroad traffic experts" "as their railroads will bear the loss if the increase of rates * * * results in a decrease of revenue". This is the **ratio decidendi** of the decision.

If, however, it is held that the question is to be determined by the opinion of the railroad experts, then there would be no necessity for a full hearing. As was said by the United States Supreme Court in the *North Carolina case*:

> "If Congress intended to permit such an oversimplified form of proof to establish "unjust discrimination". then its requirement of a "full hearing" was mere surplusage. In fact, it need have provided for no hearing at all . . ." (89 L. ed. 1766.)

The case of the *United States v. Louisiana*, 290 U. S. 70, 78 L. ed. 181, relied upon and quoted from by the Court below, has no real application to the case at bar. It involves an entirely different question. It turned upon matters of

form and phraseology: "the inadequacy of the Commission's findings" (p. 184), the basic contention of appellees being that "the Commission did not find specifically in each case that the rate as increased would be just and reasonable" (p. 187).

It did not touch the question involved here as to whether the opinions of so-called railroad experts constituted "substantial evidence".

It is earnestly submitted that if the opinion of the Court below be affirmed, such action amounts to an abdication by all the regulatory bodies of this country, including the Courts, of their function in the regulation of railroad rates.

> "We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. **Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function.**" (95 L. ed. 468.)
>
> *Universal Camera Corp. v. National L. R. Bd.*
>
> (Emphasis added.)

III. The opinion of the majority of the Court below almost wholly disregarded the testimony of the shippers to the effect that if the rates were increased as proposed, they (the shippers) would divert their traffic from the railroads to trucks.

The testimony of such shippers on this point it is submitted was in reality conclusive, as was recognized in the *Mississippi case.*

It is to be noted that there is vital distinction between the statements of the shippers that they would in fact divert their traffic from the railroads to trucks on the one hand, and the **estimates or opinions,** on the other hand, of the railroad companies' witnesses that traffic would con-

tinue such that the revenues would be increased. The one is a statement of fact by a person in position to perform what he said he would do, the other is merely an opinion of what one thinks others will do.

In all essential respects, this opinion was the same as "the assumption and opinion" in the Mississippi case, as to which the Court said:

"This assumption and opinion is contrary to the sworn testimony of those who were in position not only to know but also to control large quantities of the products upon which the rate was increased. The evidence to support this finding when weighed in the light of the prevailing rule of law is not sufficient to amount to substantial evidence."

IV. The findings of the Interstate Commerce Commission and of the Court below and the evidence upon which they were based, wholly fail to meet the test of certainty ("high standard of certainty") and clarity required by the United States Supreme Court in the *North Carolina case* and the cases therein cited:

Illinois C. R. Co. v. State Pub. Utilities Commission, 245 U. S. 493, 510, 62 L. ed. 425, 438, 38 S. Ct. 170, P. U. R. 1918C 1279. *Florida v. United States*, 282 U. S. 194, 211, 212, 75 L. ed. 291, 301, 302, 51 S. Ct. 119.

In the *North Carolina case* it is said:

"The foregoing cases also stand for the principle that the Interstate Commerce Commission is without authority to supplant a state-prescribed intrastate rate unless there are clear findings, supported by evidence, of each element essential to the exercise of that power by the Commission." (89 L. ed. 1766.)

In the case at bar, the Commission itself expressly recognized and said that the evidence was "convincing, that some and perhaps a material diversion of traffic in some of these commodities with result from the increases

herein approved", but went on to conclude that a "substantial increase in respondents' revenues can reasonably be expected from intrastate rates as thus increased". **But the Commission was unable to specify and did not undertake to specify the extent to which such diversion would take place, or the amount of such expected increase in revenues which might result.**

For all that appears from the findings of the Commission and of the Court, the amount of such increase might be $10,000.00, or $25,000.00, or $50,000.00, or $100,000.00, or possibly $250,000.00 or any other possible amount without any indication from the Commission or the Court as to what amount of money in dollars and cents was considered enough to be "substantial".

As was well said by Judge Timmerman, "the evidence upon which the Interstate Commerce acted is not only equivocal in many respects, it is vague and uncertain".

In this connection it is to be noted that the railroad companies in their written argument before the Court below had this to say, by way of conclusion:

"The railroads did show, both by the testimony of competent and experienced witnesses and by data revealing the effect on their traffic and revenues of the same increases in their interstate and their intrastate rates in other states that an increase in revenue from the increases required in the South Carolina rates **was all but inevitable.**" (Emphasis added.)

When the most that the counsel for the railroad companies can say is that "**an increase**" in the revenues "**was all but inevitable**", it is manifest that the evidence produced fails to meet the test required by the cases, that is "a high standard of certainty" and "justification for the exercise of Federal power must clearly appear".

V. Also, it is submitted that the Court below completely disregarded and overlooked the significance of the

action of the railroad companies, with the approval of the Interstate Commerce Commission, in withdrawing the items of cement and cotton from their application for an increase in the rates.

The item of cement alone amounting to $214,743.23 was by far the largest single item involved, and the testimony on this point, both for and against, was substantially the same as that with regard to the other items.

The testimony of Mr. Kane showed that in interstate commerce the revenue from the cement had risen from $7,990,849.00 in 1947 to $14,611,572.00 in 1952, an increase of 83%; and that the tonnage had increased during the same period from 3,392,312 tons in 1947 to 4,484,624 tons in 1952, an increase of 32%.

From an examination of Mr. Kane's Exhibit (Exhibit No. 3, Sheet H) it will be seen that the percentage increase shown there for cement from the increased rates in interstate commerce for the period in question 1947-1952 was greater than on any of the other major items involved.

And yet during the progress of this hearing, the railroad companies, with the approval of the Commission, asked to be allowed to withdraw the item of cement upon the ground as stated that they must reduce their rates if they were to continue to meet truck competition.

Such action, it is submitted, amounts to proof positive that the experience in interstate commerce upon which the carriers relied is unsubstantial and worthless as a guide for what will happen in intrastate commerce.

VI. Counsel for the United States of America and for the Interstate Commerce Commission in their written brief filed in the Court below had this to say:

"The Commission and the United States have not accepted as correct statements of the law all that was said in the majority opinion in the *Mississippi case*, including

several statements indicating that findings of fact made by the Mississippi Public Service Commission were entitled to greater weight than contrary findings made by the Interstate Commerce Commission. We cannot believe that the Supreme Court, in their affirming *per curiam* the judgment of the District Court, intended thereby to approve such expressions."

It would seem to us clear that when the United States of America and the Interstate Commerce Commission say in their written brief that they "have not accepted as correct" what was said by the Court in an opinion which was affirmed by the United States Supreme Court, and when such opinion was disregarded by the Court below, certainly a situation is presented where either the decision of the Court below should be reversed or full argument thereon should be heard.

We hear a good deal in these days of interposing the authority and sovereignty of the states against decisions of the United States courts and of the United States Supreme Court, but we hardly expected such pronouncements from United States of America and one of its principal Commissions.

VII. Section 1253 of the Code expressly provides that any party may appeal to the United States Supreme Court from an order granting or denying an injunction in any suit required to be heard and determined by a three-judge court.

This section was no doubt enacted by the United States Congress in recognition of the importance of all the cases required by law to be heard by a three-judge Court and of the importance of a right of appeal in such cases.

It is our view that the present case fulfills all the requirements by reason of its importance and otherwise for a full hearing by the United States Supreme Court on the questions and issues involved.

It seems to us, therefore, that both under the statute and under the peculiar facts of this case, a full hearing on the merits is justified and required.

It is earnestly submitted that the judgment of the Court below should be, and if a full hearing is granted, will be, reversed.

Respectfully submitted,

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